

STATE OF VERMONT

HUMAN SERVICES BOARD

In re) Fair Hearing No. N-01/09-62
)
 Appeal of)

INTRODUCTION

The petitioner appeals the decision by the Department for Children and Families substantiating a report that the petitioner sexually abused a child. The issues are whether the Department's decision is supported by a preponderance of the evidence and by the statutory definition of sexual abuse.

The following findings of fact are based on the testimony and other evidence admitted at the hearing in this matter held on July 28 and September 9, 2009. The petitioner appeared *pro se* at the hearing.

FINDINGS OF FACT

1. In March 2008 the Department received a report from the mother of a fifteen-year-old girl (A.) that her daughter had told her that the petitioner, then age twenty-six, had engaged in certain sexual acts with her.

2. A.'s mother testified at the hearing that A. had reported the incidents to her family several months after they had occurred, after A. learned that the petitioner's

wife had left him. The mother testified that she immediately reported A.'s allegations to the police.

3. Shortly thereafter, A. was interviewed by a police detective and a Department investigator. The detective testified at the hearing that A. told them during the interview that several months earlier, over a course of several weeks, the petitioner had engaged in sex with her, including penetration of her vagina with his penis and fingers, on six occasions, which had occurred on the petitioner's living room couch while the baby slept in the bedroom.

4. The police detective also testified that he then interviewed the petitioner, who adamantly denied the incident. The detective testified that when he questioned him as to A.'s possible motives in reporting the incidents, the petitioner stated that A. may have been "jealous" that the petitioner and his wife had paid A.'s younger sister to babysit more often than they had A.

5. A., who is now seventeen, appeared as a witness at the hearing. The Department represented, and the petitioner did not dispute, that A. has learning disabilities, which were mildly evident in her demeanor. By agreement of the parties she was questioned alone by the hearing officer using

questions submitted by the parties in advance. The testimony took place in a room where the hearing officer and the girl could be heard and observed by the parties through one way glass.

6. A. was nervous, but cooperative and responsive during the hearing officer's examination. She stated that during the summer of 2007 she had worked as a babysitter for the petitioner and his wife at their home. She stated that on six occasions, the petitioner came home from work during lunchtime, ordered the older children out of the house, and had sex with her in the living room while the youngest child slept in the bedroom. She stated that the sex involved copulation and digital penetration.

7. A. stated that she did not immediately tell anyone about these incidents because she liked the petitioner's wife, and didn't want to upset her. She says she first told her aunt as soon as she learned that the petitioner's wife had taken the children and left the petitioner.

8. Some of A.'s responses at the hearing appeared to have been rehearsed, but nothing in her demeanor caused the hearing officer to doubt the overall truthfulness and accuracy of her testimony.

9. Both of A.'s parents testified briefly at the hearing. Nothing in either their testimony or demeanor suggests that they had any role or interest in concocting, influencing or embellishing their daughter's reported version of the incidents.

10. The petitioner testified in his own behalf at the hearing. He stated that he and his wife were friends with A.'s family, and that over that summer (2007) he and his wife had frequently employed A. and her younger sister to babysit their three children, then ages seven, five, and two, during the days when he and his wife were both working. He adamantly denied A.'s allegations.

11. In weighing the credibility of A. versus the petitioner, A.'s lack of motive for fabrication is striking. The petitioner theorizes that A. was upset that he and his wife had expressed dissatisfaction with A.'s care of the children and the house, and had hired A.'s sister in her place. The petitioner also stated that A.'s father owed him money. None of these allegations, even if true, in any way explain either the *timing* of A.'s allegations or her persistence and consistency in cooperating with the Department throughout its investigation and subsequent hearing.

12. Another factor weighing heavily against the petitioner's credibility was his insistence at the hearing that he never came home from work during the day when A. was babysitting. At the close of the testimony on July 28, 2009, the petitioner maintained that his wife would also testify to this effect. Over the Department's objection, the hearing was continued to allow the petitioner to call his wife as a witness (which took place on September 9, 2009).

13. The petitioner's wife testified that she and the petitioner are separated, although it appears that she is supporting him in this matter.¹ She stated that during the summer of 2007 the children were always at the house during the day. However, contrary to what-had-been the petitioner's offer of proof, she testified that when she was at work she had no way of knowing if the petitioner came home or not.

14. When questioned as to A.'s possible motive, the petitioner's wife, without any further explanation or elaboration as to how it would contradict A.'s allegations, stated that she thinks A. had a "crush" on the petitioner.

15. As a rebuttal witness, a Department investigator testified that the petitioner had admitted in an interview

¹Both the petitioner and his wife stated that these charges are presently interfering with the petitioner's ability to have unsupervised visits with his children.

with him in April 2008 that he had at times been present in the house without his wife with the babysitter for periods of half an hour to one hour, but that his children were always present. This reveals an inconsistency in the petitioner's denials at the hearing and lends credibility to the circumstances described by A. in her allegations.

ORDER

The Department's decision substantiating the report of sexual abuse is affirmed.

REASONS

The Department is required to investigate reports of child abuse or neglect and to maintain a registry with the names and records of those who are determined to have a "substantiated" finding of abuse or neglect. 33 V.S.A. § 4913 and 4916. A report is substantiated when it is "based upon accurate and reliable information that would lead a reasonable person to believe that the child has been abused or neglected." 33 V.S.A. § 4912(10).

The statutory sections relied upon by DCF in this matter include the following:

(2) An "abused or neglected child" means a child whose physical health, psychological growth and development or welfare is harmed or is at substantial risk of harm by

the acts or omissions of his or her parent or other person responsible for the child's welfare. An "abused or neglected child" also means a child who is sexually abused or at substantial risk of sexual abuse by any person.

. . . .

(8) "Sexual abuse" consists of any act or acts by any person involving sexual molestation or exploitation of a child including but not limited to incest, prostitution, rape, sodomy, or any lewd and lascivious conduct involving a child. Sexual abuse also includes the aiding, abetting, counseling, hiring, or procuring of a child to perform or participate in any photograph, motion picture, exhibition, show, representation, or other presentation which, in whole or in part, depicts a sexual conduct, sexual excitement or sadomasochistic abuse involving a child.

33 V.S.A. § 4912

In this case, the petitioner denies that he ever engaged in sexual acts with A. He does not question that the acts alleged by A., if they occurred, would be considered sexual exploitation under the above statute. In a *de novo* hearing it is the Department's burden of proof to establish the facts of the allegations by a preponderance of evidence. In most cases, and certainly this one, the relative credibility of the witnesses is crucial.

As noted above, A. was deemed to be a credible witness. She has been consistent in her allegations, and there is no credible evidence calling into question either their timing

or the circumstances under which she alleges they happened. There is also no credible basis to question her motives in making these allegations and in continuing her cooperation with the Department during the petitioner's appeal.

Given the above-noted inconsistencies in the petitioner's testimony, and the implausibility of the motives he attributes to A., the petitioner's denials are deemed not to be credible.

Therefore, the Department's decision substantiating the report in question as one of sexual abuse must be affirmed.

3 V.S.A. § 3091(d), Fair Hearing Rule No. 1000.4D.

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